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NOTICE OF ENVIRONMENTAL APPEAL

TO BE COMPLETED BY PLANNING STAFF			
FILE NUMBER <i>PP05-214</i>	RECEIPT # <i>577215</i>		
TYPE OF ENVIRONMENTAL DETERMINATION (EIR, MND, EX) <i>Supplemental EIR</i>	AMOUNT <i>\$100</i>		
	DATE <i>5/24/10</i>		
	BY <i>Mecra</i>		
TO BE COMPLETED BY PERSON FILING APPEAL			
PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.			
THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING ENVIRONMENTAL DETERMINATION: Certification of the Final Supplemental Environmental Impact Report prepared for the Baseball Stadium in the Diridon/Arena Area (Modified Project to the 2006 Stadium Proposal, File No. PP05-214)			
REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.): See attached letters, as well as public comments on draft EIR and those made orally, and in writing, at the May 19, 2010 Planning Commission hearing.			
PERSON FILING APPEAL			
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PLEASE SUBMIT THIS APPLICATION IN PERSON TO THE DEVELOPMENT SERVICES CENTER, CITY HALL.



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May 19, 2010

The Planning Commission of the City of San Jose
Department of Planning, Building & Code Enforcement
200 East Santa Clara Street
San Jose, CA 95113-1905

Re: Baseball Stadium In The Diridon/Arena Area (Modified Project)
Supplemental Environmental Impact Report
State Clearinghouse No. 2005112126; Project No. PP05-214

Dear Commission Members:

This firm represents Stand For San Jose, a coalition of entities and individuals including citizens of San Jose and the San Jose Giants. Stand For San Jose's members are vitally concerned with the City's future, and seek to ensure that issues critical to taxpayers, jobs, local businesses and neighborhoods are put first as the City evaluates proposed development projects that have the potential to significantly reshape the City's way of life. Stand For San Jose supports a vigorous public planning and environmental review process to make certain that the City's citizens and decision makers have all of the information necessary to make informed decisions.

On March 29, 2010, Stand For San Jose submitted a comment letter on the draft Supplemental Environmental Impact Report ("SEIR") prepared for the "Baseball Stadium in the Diridon/Arena Area (Modified Project)" ("Modified Project"), which the City is preparing in its effort to bring the Oakland Athletics ("the A's") to San Jose.¹ This letter incorporates herein the comments from that letter, which is attached hereto for your convenience. Stand For San Jose submits that the comments from that

¹ The City certified an EIR for the project in February 2007 ("2007 EIR"). See Planning Commission Resolution 07-009. The draft SEIR refers to the project analyzed in the 2007 EIR as the "2006 Stadium Proposal," and for convenience this letter does as well.

letter have not been adequately responded to in the final EIR and that each of the grounds identified in that letter independently warrant a decision by the Planning Commission to not certify the final SEIR. This letter also submits further comments on the sufficiency of the recently published the Responses to Comment ("RTC") volume of the SEIR.

The primary purpose of the SEIR is to provide the City with the information necessary to decide whether to place a measure on the ballot seeking the electorate's permission to use public resources to support development of a baseball stadium for the A's ("Stadium"). In this respect, the SEIR serves two important functions. First, the SEIR must be legally sufficient to support any action taken by the City. Second, the SEIR must adequately disclose the potential environmental effects of the Modified Project so that the City's electorate can make an informed decision regarding whether to commit scarce public resources to what is essentially a private enterprise. For the reasons described in Stand For San Jose's March 29, 2009 letter, as well as those discussed below, we believe the SEIR is inadequate and does not comply with the California Environmental Quality Act ("CEQA") and the State CEQA Guidelines.²

A. The SEIR Improperly Circumscribes the Analysis of the Modified Project's Impacts on Transportation, Circulation and Parking and Must be Revised and Recirculated to Correct this Deficiency.

In its March 29, 2010 comment letter, Stand For San Jose noted that the draft SEIR improperly relied upon the City's Transportation Level of Service ("LOS") Policy to limit the impact analysis from the Modified Project's traffic to the 5:00 to 6:00 pm "peak travel period."³ See Draft SEIR, p. 56. The draft SEIR undertakes this narrow analysis despite acknowledging that "the period of highest trips for the proposed stadium project" will be between 6:00 and 7:00 pm, and traffic from the Modified Project during that time period will have potentially significant environmental effects. The draft SEIR concluded that, despite the fact that the highest levels of traffic from the Modified Project will be from 6:00 to 7:00 pm, the SEIR need not identify those

² Pub. Res. Code § 21,000 et. seq. CEQA is implemented through the State CEQA Guidelines ("Guidelines") found at 14 Cal. Code Regs. § 15,000 et seq.

³ Stand For San Jose was not alone in raising this issue as San Jose Arena Management, LLC and the Santa Clara Valley Transportation Authority ("VTA"), as well as other commentors, also raised this concern. See Comment Letters B5, C7, C11 and C12.

impacts as significant because the Transportation LOS Policy allows such impacts to be disregarded.

The final SEIR responded to comments on this issue in Master Response ("MR") No. 1, which provides that "the Draft SEIR transportation analysis was prepared in accordance with the City's Transportation Level of Service (LOS) Policy and the Santa Clara County Congestion Management Program. It analyzes the weekday 5:00-6:00 p.m. peak hour, which is the typical peak hour that is analyzed in traffic studies in San Jose." See RTC, p. 7. In other words, the City is relying on its policy to avoid identifying as significant impacts to intersection levels of service, and to avoid analyzing altogether impacts to freeway segments, caused by traffic generated by the Modified Project from 6:00-7:00 p.m. The City's rigid reliance on its Transportation Policy elevates form over substance in a manner than has been specifically rejected by California courts in CEQA cases.

In *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, the court rejected the City of Los Angeles's decision to not analyze potential traffic impacts from a single-family residential development project based on the City's threshold of significance. According to the mitigated negative declaration prepared for the project, "[t]he Los Angeles Department of Transportation has established traffic impact thresholds based on the type and intensity of land use. The threshold for single-family home developments is 40 dwelling units or more; the project involves 23 low-density, single-family housing units on large lots. Therefore, the project does not meet the threshold criteria for traffic impacts." *Id.* at 341-342. According to the court, while "a threshold of significance may be useful to determine whether an environmental impact normally should be considered significant ... A public agency cannot apply a threshold of significance or regulatory standard 'in a way that forecloses the consideration of any other substantial evidence showing there may be a significant effect.'" *Id.* at 342 (internal citations omitted).

Similarly, in *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland et al.* (2001) 91 Cal.App.4th 1344 ("*Berkeley Keep Jets*"), the Port of Oakland used an established threshold of significance for noise exposure to "automatically exclude[] 'all residential uses within the 65 CNBL contour regardless of the change in noise due to the'" proposed project. *Berkeley Keep Jets*, 91 Cal.App.4th at 1381 (emphasis in original). The court rejected such a rigid approach. Based on evidence in the record supporting a conclusion that the change in noise levels would have an adverse effect on area residents, the Port was required to perform an analysis of actual impacts from the project.

Mejia and *Berkeley Keep Jets* are directly on point here. As with Los Angeles's reliance on its traffic threshold in *Mejia* and the Port's reliance on the noise threshold in *Berkeley Keep Jets*, the City's reliance on its Transportation LOS Policy to refuse to undertake the necessary analysis of the Modified Project's impacts to transportation, circulation and parking fails in the face of the City's admission that the vast majority of the Modified Project's impacts occur during the 6:00-7:00 p.m. time period. Indeed, the level to which the City has relied upon its Transportation LOS Policy to avoid the necessary impact analysis demonstrates just how much the Modified Project's potential environmental effects on traffic have been "hidden" from public review and comment. The City also relies on its artificially narrow Transportation LOS Policy to decline to analyze impacts related to simultaneous events (*see* RTC, p. 10) and weekday games (*see* RTC, p. 16).

As noted above, the City did undertake an "informational" analysis of the Modified Project's impacts on intersection levels of service in the downtown area from 6:00-7:00 p.m. and acknowledged that Project-related traffic would degrade four intersections to an unacceptable level of service under the City's Transportation LOS Policy. *See* RTC, p. 9. However, the City failed to identify these impacts as significant and unavoidable, or to propose mitigation measures to reduce these impacts to the extent feasible, as discussed further in Section B, *infra*.

More troubling, the City failed to undertake even an "informational" analysis for freeway segments that would be impacted by the Modified Project's traffic during the 6:00-7:00 p.m. time period. In response to a comment from VTA regarding this issue, the SEIR states in conclusory terms that "the volume of the freeways from 6:00-7:00 p.m. is approximately 80 percent of the volume from 5:00-6:00 p.m. If one accounts for the lower traffic volumes from 6:00-7:00 p.m. most freeway segments would have much less combined traffic. It can be concluded that overall the freeway system would operate with higher volume from 5:00-6:00 p.m. than 6:00-7:00 p.m."⁴ *See* Response B5-19. But, the overall volume of the freeway system is irrelevant to whether the Modified Project impacts specific freeway segments.⁵ The draft SEIR

⁴ Stand For San Jose also commented on the lack of analysis of the Modified Project's impacts on freeway segments during the 6:00-7:00 p.m. time period (*see* Comment C12-17). However, the SEIR fails to respond to this comment except with a reference to MR TCP No. 1, which does not discuss freeway segments but rather focuses on intersection LOS.

⁵ The City's seeming reliance on the 80% reduction to the overall freeway system is misplaced for at least three reasons. First, the impact analysis focuses on individual freeway segments, not the "overall freeway system," so a conclusion regarding reduction in traffic volume in the overall
(... continued)

identified 15 freeway segments that will suffer a significant adverse effect during the 5:00-6:00 p.m. time period as a result of the Modified Project. *See* Draft SEIR, p. 59. The draft SEIR also acknowledged that the vast majority of the Modified Project's traffic will occur during the 6:00-7:00 p.m. time period. However, the SEIR simply fails to quantify the Modified Project's contribution to the freeway segments volume levels during the 6:00-7:00 p.m. time period based on the rationale that it need only study the 5:00-6:00 p.m. time period under the City's Transportation LOS Policy and the Santa Clara Congestion Management Plan.

In essence, the SEIR acknowledges that the heaviest traffic from the Modified Project will occur between 6:00-7:00 p.m., and then declines to address the potential significant impacts of this Project-generated traffic based on a hyper-technical reading of the City's Transportation LOS Policy. Not only does CEQA not permit such a technical reading, but relying on such a technicality denies the City's decision-makers and the electorate the information necessary to understand the true impacts of the Modified Project on the City's limited transportation infrastructure. This is inadequate as a matter of law, and the SEIR must be revised and recirculated to adequately analyze the Modified Project's impacts on intersections and freeway segments.

B. The Final SEIR Fails to Analyze the Feasibility of Mitigation That Would Reduce Impacts to Local Intersections.

In addition to failing to analyze the Modified Project's traffic impacts during the 6:00-7:00 p.m. time period, the SEIR also fails to identify feasible mitigation that would reduce impacts to local intersections effected by the Modified Project. MR No. 1 explains this deficiency as a function of the City's Downtown LOS exemption, stating that "[a]ll Downtown San Jose intersections are exempt from the City's

(... continued)

freeway system is irrelevant for purposes of determining whether the Modified Project has potentially significant environmental effects on individual freeway segments. Second, there is no empirical data in the SEIR to suggest that an 80% reduction in traffic volumes across the freeway system translates into an across the board 80% reduction in volume in individual freeway segments. Thus, the freeway segments impacted by the Modified Project may not have a corollary reduction in traffic volumes. Finally, even if the freeway segments studied in the SEIR operated at 80% volume during the 6:00-7:00 p.m. time period compared to the 5:00-6:00 p.m. time period, there is no data in the SEIR to suggest that these segments would not still be operating at above the accepted volume, or that the traffic from the Modified Project would not trigger the threshold of significance for these segments in any event.

Transportation LOS policy for purposes of requiring mitigation.” *See* RTC, p. 8. CEQA does not permit the City to avoid identifying and analyzing feasible mitigation of project-specific impacts based on a policy decision that such impacts have been deemed “acceptable.” Similar to the City’s decision to avoid traffic impact analysis based on its Transportation LOS Policy, the City’s refusal to even consider feasible mitigation conflicts with the fundamental purpose of CEQA as a public accountability statute meant to inform decision makers and the public about a project’s impacts on the environment and the available means to reduce those impacts.

A similar issue arose in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98. There, the court set aside proposed Guidelines § 15152(f)(3)(C), which would have permitted lead agencies “approving a later project that has significant unavoidable impacts, to forego making a statement of overriding considerations *specifically tied to that project*.” *Id.* at 124 (emphasis in original). The court rejected this approach as contrary to CEQA:

Under CEQA section 21081, an agency approving a project with significant environmental effects must find that each effect will be mitigated or avoided, or “that *specific* overriding economic, legal, social, technological, or other benefits of *the project* outweigh the ... effect[]” ... Under Guidelines section 15152(f)(3)(C), however, an agency apparently could adopt one statement of overriding considerations for a prior, more general EIR, and then avoid future political accountability by approving later, more specific projects with significant unavoidable impacts pursuant to the prior EIR and statement of overriding considerations. Even though a prior EIR’s *analysis* of environmental effects may be subject to being incorporated in a later EIR for a later, more specific project, the responsible public officials must still go on the record and explain specifically why they are approving the later project despite *its* significant unavoidable impacts. *Id.* at 124-125 (emphases in original).

The same rationale applies to the City’s effort to exempt all Downtown projects from the duty to mitigate project-specific impacts to Downtown intersections. Even if the City ultimately determines that there is no feasible mitigation for the impacts to the intersection, the SEIR must attempt to identify feasible mitigation so that the decision-makers have a basis upon which to make their determination. Avoiding such project-specific analysis in essence gives individual project proponents a “blank check” to impact Downtown intersections without even considering whether those proponents should be required to pay a “fair share” of programmed transportation improvements. This is particularly troubling here, where, according to recent news reports, the cost of land and transportation improvements necessary to support

construction of the Stadium is approximately \$72 million. In other words, the City is committing \$72 million of public funds to the Modified Project, yet has declined to even consider mitigation which would require the eventual occupant of the ballpark, the A's, to contribute a cent. This is unacceptable under CEQA and, equally importantly, should be unacceptable as a matter of fiscal policy.

C. The Final SEIR Fails to Adequately Respond to Comments on the Draft SEIR.

The City has failed to comply with CEQA by inadequately responding to comments on the draft SEIR. A lead agency's written responses to comments must demonstrate good-faith, reasoned analysis. Conclusory statements not supported by factual information are insufficient. 14 Cal. Code Reg. § 15088(b); see *Cleary v. County of Stanislaus* (1981) 118 Cal. App. 3d 348, 357; *People v. County of Kern* (1974) 39 Cal. App. 3d 830, 841; *People v. County of Kern* (1976) 62 Cal. App. 3d 761, 770; *Rural Landowners Assn. v. City Council* (1983) 143 Cal. App. 3d 1013, 1023; see also *Santa Clarita Organization for Planning and Environment v. County of Los Angeles* (2002) 106 Cal. App. 4th 715, 722 (problems raised by public and responsible experts require good faith reasoned analysis in response). Here, the responses to comments are in many instances wholly conclusory, with no reasoned analysis or data provided to support the conclusions.

For example, VTA commented that the draft SEIR failed to analyze the potential effects of the Modified Project on existing bus and shuttle service to Diridon Station along Santa Clara Street, as well as projected future bus service to serve the Silicon Valley Rapid Transit Corridor ("SVRTC") project. See Comments B5-3, B5-6, B5-8. Response B5-8 then states that the comment "suggests there could be up to 39 buses per hour in each direction on Santa Clara [Street]. This is between one and two buses per [traffic signal cycle], which could easily be accommodated on Santa Clara Street." However, there is no data provided to support this conclusion. While the response focuses on the number of traffic signal cycles on Santa Clara Street during peak hour traffic, there is no analysis of the interaction between traffic signal timing cycles and traffic levels (e.g., how one effects the other), and in particular how this interaction will effect the current and future bus service in and around Diridon Station.

Similarly, in comment B5-14, VTA notes that the SEIR fails to analyze the impacts associated with VTA constructing only the minimum operating segment of the SVRTC project, i.e., the two-station Berryessa Extension Project ("BEP"). In response to this comment, the SEIR states that "[i]n the case where BART is extended only to the Berryessa station, the impact in the Diridon area would be less than anticipated." This conclusion lacks any factual support, and fails to take into

consideration the increased bus trips from Diridon Station that would be associated with construction of the BEP segment only.

The SEIR also fails to adequately respond to the comment that the project description improperly omits reference to the narrowing of Bird Avenue between San Carlos Street and Park Avenue under the optional expansion of the Stadium footprint by 100 feet to the south. *See* Comment C12-5. In response, the SEIR states simply that the impacts from the narrowing of Bird Avenue on traffic have been included in the SEIR. But this response fails to explain why an admitted component of the Modified Project has been omitted from the project description, why the SEIR cannot modify the project description to correct this obvious error and, most importantly, whether the effects of the Bird Avenue narrowing have been analyzed in other impacts areas, e.g., noise or cumulative impacts. Nor is it clear whether the Bird Avenue narrowing was considered in the Initial Study ("IS") when it concluded the Modified Project had not impacts new impacts besides transportation, noise, and climate change. These issues were specifically raised in Comment C12-5, yet the SEIR fails to address them.

Stand For San Jose also commented on the sufficiency of the cumulative impacts analysis (*see* Comment C12-21), and in response the SEIR basically cross-referenced MR No. 6 (*see* Response C12-21). In that MR, the SEIR states that "[a]ll projects cited in the various comments have been included in the Cumulative Scenario. The comments have not identified any projects which are not included in the cumulative analysis." *See* RTC, p. 18. This statement is at best confusing, and at worst misleading. Stand For San Jose's comments identified several other development projects in the vicinity of Diridon Station for which the City is currently processing applications. These projects include: a proposed 18,000-seat soccer stadium; a mixed-use project combining 600 residential units and 30,000 square feet of commercial space located on the site of the Japantown Corporation Yard; two other mixed-use projects (one with 825 residential units and 50,000 square feet of commercial space, the other with 218 units and 22,600 square feet) just south of the Project site near West San Carlos Street; and an urban public market on the east side of Highway 87.⁶ If the SEIR is contending these projects are included in the cumulative impacts analysis, then it should delineate them in current list of cumulative projects. On the other hand, if the SEIR is contending that the above projects do not need to be included in the cumulative impacts analysis, then it needs

⁶ All of these projects are as close or closer to the Stadium site than the cumulative projects studied in the 2007 EIR.

to provide substantial evidence as to why these reasonably foreseeable projects have been excluded. It appears, however, that these projects have been excluded from the cumulative impacts section of the SEIR without explanation or response, in which case the SEIR needs to be revised and MR No. 6 is simply incorrect.

D. The SEIR is Legally Inadequate for A Number of Additional Reasons.

In addition to the reasons set forth above, the SEIR also fails as an informational document for the reasons set forth in our March 29, 2010 comment letter, including but not limited to the following reasons:

- The SEIR uses an inaccurate environmental baseline by identifying the 2007 EIR as the baseline rather than the actual physical conditions on the ground in 2010. The California Supreme Court recently rejected efforts to rely on a "permitted capacity" environmental baseline, i.e., a baseline that exists only on paper. *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310. The 2007 EIR is in essence a "paper baseline" since the 2006 Stadium Proposal was never approved.
- Use of the 2007 EIR as the environmental baseline effects the SEIR's impact analysis because it measures the impacts from the Modified Project against those of the 2006 Stadium Proposal rather than against the existing environmental baseline. This is not permitted under CEQA.
- The SEIR's analysis of cultural resources, hazards and hazardous materials, land use and planning, noise and cumulative impacts is inadequate under CEQA.

E. The Draft EIR Must Be Revised and Recirculated.

CEQA Guidelines § 15088.5 requires an EIR to be recirculated if "significant new information" is added to a draft EIR that shows:

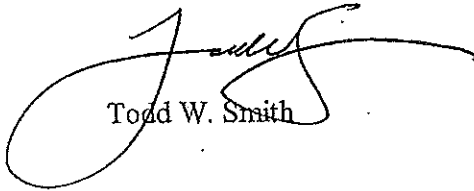
- (1) a new significant environmental impact not previously identified would occur;
- (2) an identified impact would be substantially more severe;
- (3) a considerably different feasible alternative or mitigation measure that would avoid or substantially lessen impacts has been identified but the project proponent has declined to adopt it; or

(4) the draft EIR is so fundamentally and basically inadequate and conclusory in nature as to preclude meaningful comment.

Here, the City must revise and recirculate the SEIR because it fails to adequately identify impacts to intersection and freeway segment levels of service between 6:00-7:00 p.m., fails to adequately disclose the full scope of the Modified Project, and fails to adequately identify and analyze cumulative impacts from other projects planned for the project area. Recirculation is necessary in order for the decision makers and the public to be able to make an informed decision related to the proposed Baseball Stadium.

Thanks you for your consideration of these comments.

Very truly yours,



Todd W. Smith



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March 29, 2010

Darryl Boyd, Principal Planner
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200 East Santa Clara Street
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Re: Baseball Stadium In The Diridon/Arena Area (Modified Project)
Supplemental Environmental Impact Report
State Clearinghouse No. 2005112126; Project No. PP05-214

Dear Mr. Boyd:

This firm represents Stand For San Jose, a coalition of entities and individuals including citizens of San Jose and the San Jose Giants. Stand For San Jose's members are vitally concerned with the City's future, and seek to ensure that issues critical to taxpayers, jobs, local businesses and neighborhoods are put first as the City evaluates proposed development projects that have the potential to significantly reshape the City's way of life. Stand For San Jose supports a vigorous public planning and environmental review process to make certain that the City's citizens and decision makers have all of the information necessary to make informed decisions.

This letter provides Stand For San Jose's comments on the Initial Study ("IS") and draft Supplemental Environmental Impact Report ("SEIR") prepared for the "Baseball Stadium in the Diridon/Arena Area (Modified Project)" ("Modified Project"), which the City is preparing in its effort to bring the Oakland Athletics ("the A's") to San Jose.¹ The primary purpose of the draft SEIR is to provide the City Council with the information necessary to decide whether to place a measure on the

¹ The City certified an EIR for the project in February 2007 ("2007 EIR"). See Planning Commission Resolution 07-009. The draft SEIR refers to the project analyzed in the 2007 EIR as the "2006 Stadium Proposal," and for convenience this letter does as well.

ballot seeking the electorate's permission to use public resources to support development of a baseball stadium for the A's ("Stadium"). In this respect, the draft SBIR serves two important functions. First, the SBIR must be legally sufficient to support any action taken by the City Council. Second, the SBIR must adequately disclose the potential environmental effects of the Modified Project so that the City's electorate can make an informed decision regarding whether to commit scarce public resources to what is essentially a private enterprise.

For numerous reasons described below, we believe the draft SBIR is inadequate and does not comply with the California Environmental Quality Act ("CEQA") and the State CEQA Guidelines.² Accordingly, the draft SBIR must be revised and recirculated to ensure that the City's decision makers and the public have a sufficient understanding of the environmental impacts of the Modified Project, both individually and cumulatively when considered together with other planned development in the Diridon/Arena Area of San Jose.

A. The IS and Draft SBIR Are So Fundamentally Inadequate As to Preclude Meaningful Comment.

Following certification of the 2007 EIR, the City did not proceed to approve the 2006 Stadium Proposal or take any other action in reliance on that document. Rather, the City shelved the 2007 EIR when it appeared the A's might relocate to Fremont, CA. The City has now "dusted off" the three year old EIR and prepared a draft SBIR of very limited scope to analyze the environmental effects of the Modified Project as compared to the 2006 Stadium Proposal. However, the propriety of relying on the 2006 Stadium Proposal and 2007 EIR as the basis for restricting the draft SBIR to analysis of a few issues is questionable since the City never approved the 2006 Stadium Proposal.

As discussed in Stand for San Jose's December 16, 2009 letter commenting on the appropriate scope of the SBIR, since there is no actual approved project against which to compare the changes being proposed by the City, the appropriate "environmental baseline" is the actual physical conditions on the ground in 2010 and not the 2006 Stadium Proposal (which was never more than a gleam in the City's eye). CEQA Guidelines § 15125(a). The draft SBIR should therefore have updated the

² Pub. Res. Code § 21,000 et. seq. CEQA is implemented through the State CEQA Guidelines ("Guidelines") found at 14 Cal. Code Regs. § 15,000 et seq.

environmental baseline for all environmental impact areas and analyzed the potential effects of the Modified Project against that updated baseline.

Instead, the City elected to prepare the IS, which purports to "screen out" most impact areas from further analysis based on the incremental changes between the 2006 Stadium Proposal and the Modified Project. Only three impact areas – transportation, noise, and global climate change – have been carried forward to the draft SBIR for further analysis and public review. As discussed below, however, the City uses the IS for contradictory purposes. On the one hand, the IS purports to support the City's conclusion that the Modified Project does not have any potentially significant impacts in any areas other than the three studied in the draft SBIR. On the other hand, the IS actually identifies new impacts and proposed new mitigation measures in some impact areas, e.g., cultural resources, and identifies new impacts without mitigation measures in other areas, e.g., hazardous materials. The analysis of these new impacts and mitigation measures *should have been carried forward* to the draft SBIR. The City's "two-step" process frustrates the public's ability to review and comment on the draft SBIR, and results in a document which is fundamentally insufficient for informing the decision makers and public of the environmental effects of the Modified Project. The City must revise and recirculate the draft SEIR (see § D, *infra*) so that the disclosure and analysis of all the potentially significant environmental effects from the Modified Project are contained in one complete and legally adequate CEQA document.

Moreover, it is not clear whether the City properly decided to prepare a supplemental EIR pursuant to CEQA § 21166 rather than revising and recirculating the entire 2007 EIR pursuant to CEQA § 21092.1. As noted by a leading CEQA treatise, citing *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1129 ("*Laurel Heights II*"), "*Laurel Heights II* confirms that certain principles articulated in the earlier case law apply only *after* formal approval of an initial project." Remy, Thomas et al., "Guide to CEQA" (11th ed.), p. 668 (emphasis in original). As Remy, Thomas et al. explain:

Although the Supreme Court identified "certification" as the event that must occur before section 21166 comes into play, the court at the same time cross-referenced [CEQA] section 21167.2, which provides that, if not lawsuit is filed after project approval, an EIR "shall be conclusively presumed to comply with CEQA, "unless the provisions of section 21166 are applicable. *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130 (citing Pub. Resources Code, § 21167.2). Since lawsuits are filed after project approval, rather than simply after EIR certification, the court apparently meant to

make project approval, rather than mere BIR certification, the determining fact as to whether section 21166 applies. *See* Pub. Resources Code, § 21167, subd. (c).

Id. Since the City never approved the 2006 Stadium Proposal or any other project based on the 2007 BIR, it appears the City may have been required to recirculate the entire document. In any event, the comments on the 2007 BIR remain at issue, and are incorporated herein by this reference, since CEQA permits, and requires consideration of, comments made "prior to the close of the public hearing on the project before issuance of the notice of determination." CEQA § 21177(a).

B. The Draft SEIR's Project Description is Inadequate and Fails to Inform the Public of the True Scope of the Modified Project.

An BIR must contain a general description of the project's technical, economic, and engineering characteristics, and a statement of the objectives sought by the proposed project. CEQA Guidelines §15124(b), (c); *see Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20. An accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient BIR. The project must be described accurately to allow reviewers and decision makers to balance the project's benefits against its environmental costs, to consider mitigation measures, and to assess the advantages of the no-project and other alternatives. *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193. Here, the project description fails to accurately and consistently describe the project in at least two important ways.³

First, the project description fails to disclose that, under the optional expansion of the Stadium footprint by 100 feet to the south, the Modified Project would also require that Bird Avenue be narrowed between San Carlos Street and Park Avenue, thereby reducing the number of travel lanes from three to two in each direction for that roadway segment. *See* Draft SEIR, p. 68, which discusses Bird Avenue only in the context of the traffic analysis. The failure to include this component in the project description itself, however, makes it impossible for the public to know whether the

³ The draft SEIR's project description describes modifications to 2006 Stadium Proposal, including: (1) reduction in maximum seating capacity from 45,000 to between 32,000 and 36,000 seats; (2) elimination of the proposed parking structure south of Park Avenue and consideration of three parking alternatives; and (3) an option to enlarge the Stadium footprint 100 feet to the south, resulting in the narrowing of Park Avenue from four to two lanes. Draft SEIR, pp. 17-23.

draft SEIR analyzed the impacts from this component of the Modified Project. It does not appear that the Bird Avenue narrowing was considered for example, in the Noise section, or in the cumulative impacts analysis. Equally important, since the Bird Avenue narrowing was not included in the project description in the IS, the City apparently failed to consider impacts from this part of the Modified Project when it concluded that no impact areas besides transportation, noise, and climate change needed to be considered in the SEIR.

Second, the project description is also inadequate because it fails to disclose and include as part of the Modified Project the significant land use policy changes that would need to be implemented in order to support development of the Stadium. As indicated, pursuant to the 2007 EIR, the 2006 Stadium Proposal is inconsistent with the City's General Plan, the Diridon/Arena Strategic Development Plan, the Midtown Specific Plan, and Burbank/Del Monte and Delmas Park Neighborhood Plans, or at the very least specific policies within those plans governing development in the Diridon/Arena Area. While the IS indicates that the Modified Project eliminates some of the inconsistencies, it does not conclude that all such inconsistencies will be eliminated. As such, the plans would still have to be amended prior to approval of the Modified Project, as concluded in the 2007 EIR. See 2007 EIR, p. 50-59.

For example, under the Modified Project's option to expand the Stadium footprint to include part of Park Avenue, the draft SEIR acknowledges that a "General Plan Transportation Diagram Amendment" would be necessary and would "result in significant long-term transportation impacts upon build out of the current San Jose 2020 General Plan." Draft SEIR, p. 69. However, the project description makes no mention of the fact that a General Plan amendment is necessary in order for the footprint expansion option to proceed.

If the Modified Project cannot move forward without amendments to these City plans, then amendment of those plans is necessarily a component of the Project and must be included in the project description. See e.g., *Orinda Ass'n v. Board of Supervisors* (1986) 186 Cal.App.3d 1145, 1171 (lead agency may not split project components as to avoid environmental review of the entire project). As the California Supreme Court held in *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, a project description must include all relevant parts of the project, including reasonable foreseeable future activities that are a component of the project approval. The draft SEIR admits that amendments to various City land

use plans would be necessary for the Modified Project to proceed. Those land use plan amendments are thus a reasonably foreseeable consequence, and indeed are a condition precedent to, the Modified Project. The necessary land use plan amendments must therefore be included in the draft SEIR's project description.⁴

Absent such full disclosure in the draft SEIR, a member of the public reviewing the SEIR is not reasonably informed that the Stadium will require significant changes to land use plans and policies in order to be consistent with a revised City vision for the Diridon/Arena area. Such a failure to disclose is particularly problematic given that the City will be asking the City's electorate to approve a measure which is to be placed on the ballot in reliance on the SEIR. If the SEIR fails to adequately describe the actions necessary to implement the Modified Project, then any decision made in reliance on the SEIR is suspect and potentially void.

C. The Draft SEIR's Analysis of Potential Environmental Effects is Insufficient.

The IS prepared by the City purports to eliminate the need for further analysis of most of the identified impact areas, relying primarily on the conclusions in the 2007 BIR and alleged narrow effects resulting from the Modified Project. As described below, however, the IS made several fundamental errors, and certain impact areas which were eliminated from further review should have been analyzed in the draft SEIR. Further, the analysis in the draft SEIR is itself flawed. For convenience, we have organized our comments by impact area, regardless of whether the area was addressed in the IS or draft SEIR.

1. Aesthetics.

The IS determined that the Modified Project will have the same impact on aesthetics as did the 2006 Stadium Proposal. However, the analysis of this issue is cursory at best. The Modified Project's impacts on aesthetics should have been analyzed in the draft SEIR.

The Modified Project eliminates the proposed parking structure south of Park Avenue and instead proposes three new options: a Montgomery/Autumn Street parking

⁴ As discussed in § C.4, *infra*, the City's decision to defer analysis of the environmental effects of amending these plans until *after* the potential ballot measure is also improper, separate from the failure to include the necessary plan amendments in the project description.

structure ("Montgomery/Autumn Structure"); an HP Pavilion Parking Structure ("HP Parking Structure"); and a no parking structure scenario ("No Parking Option").⁵ According to the IS, the Montgomery/Autumn Structure "would have a smaller footprint but be taller than the parking structure for the 2006 Stadium Proposal – providing eight levels of parking rather than four to six." IS, p. 13. The HP Parking Structure "would be a two-level structure or a four-to-six level structure" *Id.* Both structures would be located north of the Stadium site, whereas the parking included in the 2006 Stadium Proposal was south of the Stadium site.

Despite this change in location, the IS makes no effort to describe whether the Montgomery/Autumn Structure or the HP Parking Structure would affect different visual receptors by moving the structure to a new location. In addition, as to the Montgomery/Autumn Structure, which would be a new, eight-story building, the IS merely notes that the structure would be taller than the parking structure in the original EIR. But such a comparison is irrelevant to the Montgomery/Autumn Structure's visual prominence in the physical setting where it is proposed to be located. While the addition of two-to-four new stories to the parking structure proposed to be located south of Park Avenue might not make a significant difference to the visual impacts analyzed in the 2007 EIR, locating a brand new eight-story structure in a different area entirely very well might. As the IS notes, the Montgomery/Autumn Structure will be "several stories taller than surrounding buildings." IS, p. 13. The draft SEIR should have analyzed the potential impacts of this structure on the existing visual character or quality of the surroundings.

The IS's treatment of the potential visual effects of the HP Parking Structure is similarly cursory and inadequate. The IS provides that the HP Parking Structure would be lower than the existing visually prominent HP Pavilion. However, SBIR Fig. III-4 shows that the four-to-six story structure would cover an extensive area which, for the southern option, would be considerably larger than that of the HP Pavilion. Nevertheless, the IS fails to analyze the visual change that will result from construction of this significant structure, especially as compared to the baseline condition, a surface parking lot. Absent such analysis, there is no support for the IS's conclusion that the HP Parking Structure will have no significant visual impact, and therefore the Modified Project's potential impacts on aesthetics should have been analyzed in the draft SEIR.

⁵ Since the no parking structure option would obviously result in no aesthetic or visual impacts, it is not discussed further in this section.

2. Cultural Resources.

The IS acknowledges that the Modified Project could impact three archeological deposits near HP Pavilion if the HP Parking Structure is constructed, and adds a new mitigation measure for that impact. While adding mitigation measures to the IS might be appropriate if the City was proceeding with a mitigated negative declaration, here the City has elected to proceed to prepare an SBIR. Burying this newly identified impact and mitigation measure in the IS, rather than analyzing it in the draft SBIR, is not permitted. CEQA § 21094(c). Both the new impact and new mitigation measure should have been included in the draft SBIR to allow informed consideration by the public and decision makers.

The need for public scrutiny of the new impact and mitigation measure seems particularly important in this context since the newly proposed mitigation measure (CULT-3b) will provide the archeological resources disturbed by construction of the HP Parking Structure less protection than the cultural resources addressed in the 2007 EIR. Measure CULT-3 from the 2007 EIR provides:

"If deposits of prehistoric or historical archaeological materials are encountered during project activities, all work within 25 feet of the discovery shall be redirected until the archaeological monitor can review the finds and make recommendations. . . It is recommended that such deposits be avoided by project activities . . .

Archaeological monitors must be empowered to halt construction activities within 25 feet of the discovery to review the possible archaeological material and to protect the resource while it is being evaluated . . . If the deposits are eligible [for the California Register of Historical Resources] they will need to be avoided or adverse effects must be mitigated." 2007 EIR, p. 245.

By contrast, new Measure CULT-3b in the IS requires an archaeological monitor to conduct pre-project test excavations, which may be observed by a Native American monitor if prehistoric archaeological resources are "suspected." However, unlike Measure CULT 3, CULT-3b does not call for any monitoring after the test excavation, by either an archaeologist or a Native American monitor, and does not give the monitor authority to stop project construction until any resources uncovered during the work are assessed. Instead, if resources are uncovered, they can be capped, excavated for data recovery, or merely documented and destroyed, with the choice left to the discretion of the City. The IS fails to provide any rationale for this discrepancy, or explain why resources found at the HP Parking Structure site should be treated differently than resources found at other sites.

Moreover, the IS notes that, in the absence of further information, these archaeological resources "may qualify as historical or unique archaeological resources under CEQA." CEQA § 21083.2 provides: "If the lead agency determines that the project may have a significant effect on unique archaeological resources, the *environmental impact report* shall address the issue of those resources" (emphasis added). A negative declaration can be used for a project with non-unique archaeological resources. *Id.* Accordingly, a new impact and new mitigation measure to address archaeological resources that the IS admits may qualify as "unique" must be addressed in the body of the draft SBIR, and not in the IS. CEQA does not permit impacts on potentially unique archaeological resources to be "scoped out" of an EIR by including the new impact and mitigation measure in the IS, as the City is attempting to do here.

Finally, the IS relies upon environmental documents for the proposed Bay Area Rapid Transit ("BART") extension to Santa Clara⁶ as the sources of information for the archaeological resources which will be potentially impacted by construction of the Modified Project may potentially qualify as "unique." VTA's 2007 SBIR, p. 80, states that the City of San Jose section of the BART project contains 83 archaeological sites and that "whether these locations and resources contain deposits that qualify as important or unique under the standards of CEQA cannot be determined until test excavations are conducted." Based on further investigation, VTA's 2009 Draft EIS states that: "The City of San Jose is the most archaeologically-sensitive section" of the SVRTC project and notes archival records of more than 160 sites.

The IS and the draft SBIR acknowledge that the SVRTC project is a "cumulative project" that must be included in a quantitative analysis of cumulative traffic impacts. However, the draft SBIR disregards the cumulative impacts that the Modified Project and the SVRTC project – as well as other projects in this archaeologically sensitive area – would have on other resource areas such as archaeological resources. This analysis must be completed in the SBIR. Moreover, the potentially significant cumulative impact on archaeological resources requires a Mandatory Finding of Significance in the IS (*see* IS, p. 63) and, therefore, discussion in the draft SBIR.

⁶ The BART extension, formally known as the Silicon Valley Rapid Transit Corridor ("SVRTC") project, is being sponsored and implemented by the Santa Clara Valley Transportation Authority ("VTA"), which has certified a supplemental environmental impact report for the SVRTC project ("2007 SBIR") and is in the process of preparing an environmental impact statement ("2009 Draft EIS") pursuant to the National Environmental Policy Act.

3. Hazards and Hazardous Materials.

The IS acknowledges that the proposed site for the HP Parking Structure is a contaminated site which has undergone cleanup under regulatory agency oversight, with serious contamination allowed to remain in place underneath a cap, and a deed restriction requiring approval of the Department of Toxic Substances Control for any future excavation. IS, p. 56. The Modified Project's proposal to disturb a contaminated site under regulatory control should have been analyzed in the draft SEIR rather than the IS so that the public has the opportunity to comment on both the public health impacts associated with disturbing a known contaminated site, as well as the propriety of the HP Parking Structure option when compared to the other parking alternatives.

Moreover, the IS notes that regulatory oversight and approval of a construction plan, and a possible new deed restriction, are not included in the existing mitigation measures in the 2007 EIR. Nevertheless, the IS relies on such oversight and a new deed restriction if necessary, as the basis to conclude that construction of the HP Parking Structure on the contaminated site will not result in new significant impacts from the Modified Project. Since the IS relies upon these proposed actions to avoid impacts, these actions should be formally incorporated into Mitigation Measure HAZ-1b and disclosed in the body of the SEIR.

4. Land Use and Planning.

- a. The draft SEIR fails to analyze the potential effects of amendments to various City land use plans which the City acknowledges must be amended in order for the Modified Project to proceed.

CEQA requires that an agency consider whether a proposed project will "conflict with applicable land use plans, policies, or regulations adopted by agencies with jurisdiction over the project (including, but not limited to, the general plan, specific plans or zoning ordinance), adopted for the purpose of avoiding or mitigating an environmental effect." The 2007 EIR acknowledges that the proposed Stadium is inconsistent with General Plan land use designation for the Stadium site, as well as the Diridon/Arena Strategic Development Plan, the Midtown Specific Plan, and Burbank/Del Monte and Delmas Park Neighborhood Plans. Nevertheless, the 2007 EIR erroneously declined to analyze the environmental effects of such land use policy conflicts, instead concluding that such analysis will be undertaken when a specific stadium proposal is before the City. However, such an analysis cannot be deferred.

The IS reiterates this rationale while focusing on the changes from the 2006 Stadium Proposal caused by the Modified Project. Because the Modified Project eliminates the proposed parking structure south of Park Avenue on land previously designated for a public park (assuming relocation of the existing fire training facility), the IS concludes that the Modified Project is "generally more consistent" with applicable local plans and policies. However, the Modified Project does not eliminate, and the IS does not analyze, the acknowledged inconsistency between the proposed Stadium and the General Plan land use designation for the Stadium site, as well as the Diridon/Arena Strategic Development Plan, the Midtown Specific Plan, and Burbank/Del Monte and Delmas Park Neighborhood Plans and other plans.

Based on conflicting statements in the 2007 EIR and the IS, it is entirely unclear when and if the City intends to analyze the environmental effects of the identified land use inconsistencies. The 2007 EIR repeatedly provides that the "environmental impacts associated with such future Amendments [to land use plans], if initiated and moved forward for consideration by the City Council of the City of San Jose, would be reviewed by, and appropriate environmental clearance would be processed for consideration by, the recommending and decision-making bodies ..." See e.g., 2007 EIR, p. 55. On the other hand, the IS provides that "it is the intent of the City to use this SBIR to provide environmental clearance for future General Plan amendments at the appropriate time to reflect the ballpark use." IS, p. 42. On its face, the intent to rely on the SBIR for this purpose means that significant land use impacts deferred from consideration in the 2007 EIR must be analyzed in the SBIR. Moreover, neither proposed solution is legally adequate.

The City's proposal to defer environmental analysis of certain impacts until after the electorate's consideration of the potential ballot measure is legally incorrect. As emphasized by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, environmental review must occur as early in the project planning process as possible in order to avoid an EIR becoming a "post hoc rationalization" for a project to which the public agency has already committed. The City's proposal to defer environmental analysis of certain impacts of the Project until after the potential ballot measure clearly violates *Save Tara*, first, because the very action of seeking approval of the Project from the electorate evidences an early commitment to the Project by the City, and second, because the outcome of the ballot measure itself would give the Project such momentum that later CEQA review of the necessary land use plan amendments would be a "post hoc rationalization." See Guidelines § 15352(a). The City has a duty to analyze and disclose all of the potential environmental effects of the Project *before* seeking approval from the electorate. *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 187. Otherwise, the electorate would be making an ill-informed decision and the

necessary further environmental review would be consumed by "bureaucratic and financial momentum," rendering further analysis "practically moot." *Save Tara*, 45 Cal.4th at 130, n. 9.⁷

The City's attempt to defer the analysis of the environmental impacts from such land use policy amendments is all the more puzzling considering the City did just such an analysis for the Modified Project's option to extend the Stadium footprint into Park Avenue, which requires a General Plan Amendment. Draft SEIR, p. 69. There is no rational reason to analyze the potential environmental effects of one land use plan amendment while simply ignoring the specific scope and effects of other such amendments.

On the other hand, the City's proposal to "use this SEIR to provide environmental clearance for future General Plan amendments at the appropriate time to reflect the ballpark use" is unsupportable because the City has not actually analyzed the environmental effects of any of the identified land use inconsistencies in the 2007 EIR, the IS, or the draft SEIR, with the exception of the General Plan Amendment necessitated by the optional Stadium footprint expansion. The City cannot purport to rely on an EIR for environmental clearance of an action the potential impacts from which the City specifically declined to consider. This inconsistency underlies the fallacy of the City's land use analysis: having originally (though improperly) decided that it could defer analysis of the land use conflict to some future point in time, the City cannot attempt an 180-degree turn and claim the SEIR is sufficient to support future amendments to the identified land use policies, without having performed the requisite analysis.

The fundamental purpose of an EIR is to inform public agency decision makers and the public of the potentially significant environmental effects of a project and to identify ways to minimize or avoid those effects. CEQA Guidelines § 15121(a); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 86. In order to meet this requirement, the City must analyze the environmental effects of the land use plan

⁷ The City's attempt to segment analysis of the environmental impacts from the various City plan amendments is also a clear violation of the CEQA doctrine of "piecemealing." See Guidelines §§ 15063(a)(1), 15126.2(d); see also *Bozung v. Local Agency Formation Comm'n.* (1975) 13 Cal.3d 263, 284. As provided in *Bozung*, CEQA prohibits segmenting of projects so that "environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences."

amendments that will be necessary to support development of the proposed Stadium and, as stated in § B, *supra*, those land use plan amendments must be identified as part of the Modified Project.

- b. The draft SBIR fails to identify the General Plan land use designation or zoning for the HP Parking Structure site.

The IS goes to great lengths to explain the land use designations for the Montgomery/Autumn Structure site, including disclosure of the "planning and policy implications" of locating a parking structure at Montgomery/Autumn. However, the IS does not disclose the General Plan designation or zoning for the HP Parking Structure site, stating only that "the HP Pavilion parking structure site is currently used for parking and the use would not change should the project's parking structure be built on that site." IS, p. 42. The inconsistency between the extensive discussion of one parking structure option and the very brief statement on the other underscores the inadequacy of the latter. The mere fact that parking is an existing use is insufficient to address the compatibility of the proposed structure with land use plans and zoning. For example, there is no evidence that a parking structure as opposed to surface parking is permitted under current zoning. More generally, this limited statement does not disclose any planning and policy implications of locating a parking structure at the HP Parking Structure site, whether or what types of permits will be needed, or the various restrictions on use of parking at the HP Parking Structure site that result from the City's commitment to provide the San Jose Sharks 6,650 spaces within 1/3-mile of HP Pavilion. These issues must be disclosed and analyzed in the draft SBIR.

- c. The IS's analysis of urban decay that might result from relocation of the A's from Oakland is too narrow and must be revised and recirculated.

Based on a scoping comment, the IS undertook an analysis of the potential for the A's relocation from Oakland to cause urban blight in the area around the Oakland Coliseum. The IS concluded that, *on a city-wide basis*, baseball patrons represent less than 1% of retail and restaurant sales in Oakland, a level so small that its would not cause any such establishments to cease operations. However, based on the A's own previous analysis of the economic benefits to be derived from the A's prior proposal for relocation to Fremont, the A's accounted for \$19 million spent on goods and services in Alameda County (*see* Exhibit A, p. III-7), an additional \$1.25 million spent in Alameda County from players' salaries (*Id.*, p. III-9); as well as 207 employees from within Alameda County (*Id.*, p. III-7 and III-8) and the payroll of parking attendants for the games, totaling 59 employees and \$109,600 per game (*Id.*, p. III-9). Thus, the IS decision to limit its analysis to retail and restaurant sales in

Oakland seems far too narrow, as well as inconsistent with the previous public position of the A's themselves concerning the economic benefits derived by Alameda County from the A's presence there. Thus, the urban decay analysis must be revised and recirculated to reflect this more detailed information and potentially greater impact.

- d. The IS's analysis of the Modified Project's impacts on airport-related safety should have been included in the draft SBIR, and is improperly circumscribed.

The proposed project site is located approximately 8,500 feet southwest of Norman Y. Mineta San Jose International Airport (the "Airport") and is in direct alignment with the end of the Airport's two commercial runways (12L/30R, and 12R/30L) and its primary general aviation runway (11/29). As such, the project site is directly beneath approach and departure paths of aircraft that use the Airport, which could have serious implications for airport operations and airline safety procedures. In particular, the Modified Project exceeds the Federal Aviation Administration ("FAA") threshold height regulations that are established to ensure safety of air navigation and efficient utilization of navigable airspace, and also encroaches on the One Engine Inoperative ("OEI") emergency procedures of several airlines.

The IS discloses the Modified Project's potential conflicts with these regulations. However, the analysis of these conflicts should have been carried forward and undertaken in the draft SBIR, rather than just noted in the IS, in order to provide the public the opportunity to comment on these issues in a more informed manner. Equally important, the draft SBIR should have analyzed the public safety impacts associated with locating a baseball stadium designed to seat 32,000-to-36,000 people and which conflicts with multiple FAA regulations in the vicinity of a major international airport.

5. Noise.

The City identified noise as one of the three impact areas requiring further analysis in the draft SBIR. The Modified Project proposes demolition or relocation of seven additional buildings beyond those considered in the 2007 EIR. However, the draft SBIR fails to analyze noise associated with such demolition or the construction and operation of either the Montgomery/Autumn Structure or the HP Parking Structure. Rather, the draft SBIR noise analysis only addresses game and concert noise from the Modified Project. The draft SBIR must identify all receptors in the vicinity of the two proposed parking structures and analyze the impacts of construction of the proposed facilities on those receptors. The draft SBIR must also analyze noise from operation of the new parking facilities compared to noise

generated by current operations at the Montgomery/Autumn Structure and HP Parking Structure sites.

Further, in the air quality analysis, the IS acknowledges that "a few sensitive receptors," including a residence immediately north of the proposed Montgomery/Autumn Structure site, would be located closer to components of the Modified Project, and that realignment of South Autumn Street would bring "a few residents closer to the construction area." IS, p. 18. However, while the IS considered whether those closer residents would be exposed to increased construction dust and equipment emissions, it does not contain the same analysis for construction noise. IS, p. 19. This issue must be addressed and, if it demonstrates a potentially significant impact, analyzed in the SEIR.

6. Transportation.

The City also identified Transportation, Circulation and Parking as one of the three impact areas requiring further analysis in the draft SEIR. Despite having updated the analysis, the Transportation section of the draft SEIR still contains several fundamental flaws.

a. The draft SEIR understates or fails to analyze the Modified Project's potentially significant impacts on intersection and freeway levels of service.

The draft SEIR analyzes the impact from the Modified Project's traffic on local intersection and freeway segment levels of service and expanded the number of freeway segments analyzed as compared to 2007 BIR. However, relying on the City's Transportation Policy, the draft SEIR limits the impact analysis from the Modified Project's traffic to the 5:00 to 6:00 pm "peak travel period." See Draft SEIR, p. 56. The draft SEIR undertakes this narrow analysis despite acknowledging that "the period of highest trips for the proposed stadium project" will be between 6:00 and 7:00 pm, and traffic from the Modified Project during that time period will have a significant impact on several intersections. *Id.* In other words, the draft SEIR concludes that, despite the fact that the highest levels of traffic from the Modified Project will be from 6:00 to 7:00 pm, and that such traffic levels will cause significant impacts to local intersections, the draft SEIR need not identify those impacts as significant or attempt to mitigate those impacts because the Transportation Policy allows such impacts to be disregarded. CEQA does not permit such an approach.

In *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland et al.* (2001) 91 Cal.App.4th 1344 ("Berkeley Keep Jets"), the Port of Oakland used an established threshold of significance for noise exposure to

"automatically exclude[] 'all residential uses within the 65 CNBL contour *regardless of the change in noise* due to the'" proposed project. *Berkeley Keep Jets*, 91 Cal.App.4th at 1381 (emphasis in original). The court rejected such a rigid approach. Based on evidence in the record supporting a conclusion that the change in noise levels, even if below the threshold of significance, would have an adverse effect on area residents, the Port was required to perform an analysis of actual impacts from the project.

This same reasoning applies here. The draft SEIR's rationale for not analyzing traffic impacts which occur during the 6:00 to 7:00 pm period is that the City's Transportation Policy defines the peak travel period to be the hour between 5:00 to 6:00 pm. In other words, the draft SEIR automatically excludes any impacts to local intersections that occur outside of the 5:00 to 6:00 pm time period regardless of actual impacts to local intersections identified in the draft SEIR itself. But the primary purpose of CEQA analysis is to identify "any substantial adverse changes in physical conditions." CEQA §§ 21060.5, 21100(d). An impact is considered significant for purposes of CEQA if it will effect a "substantial, or potentially substantial, adverse change in the environment." CEQA § 21068; CEQA Guidelines § 15002.

The draft SEIR specifically acknowledges that the Modified Project's peak hour traffic would occur between 6:00 and 7:00 pm, and that such traffic would cause "operational deficiencies" at the intersection of Autumn Street and San Fernando Street, Delmas Avenue and Park Avenue, and Autumn Street and Park Avenue. See Draft SEIR, p. 56. Further, the draft SEIR acknowledges that when simultaneous events occur at the proposed Stadium and HP Pavilion, the intersection of Delmas Avenue and San Fernando Street would also be impacted. Yet, the draft SEIR presents these facts as "Informational Only" and declines to identify the impacts to the specified intersection as "significant" or to propose any mitigation. In other words, the draft SEIR acknowledges that the Modified Project will impact and degrade levels of service at four local intersections, but declines to mitigate these impacts.

The draft SEIR similarly limits its analysis of the Modified Project's impacts on freeway segments to the 5:00 to 6:00 pm time period. Unlike the intersection level of service analysis, however, where the draft SEIR at least acknowledged the existence of impacts from the Modified Project during the 6:00 to 7:00 pm time period, the draft SEIR fails to even provide data for or analyze the Modified Project's impacts to freeway segment operations during the 6:00 to 7:00 pm time period despite the express acknowledgment that this time period is when the Modified Project will contribute the highest level of additional vehicle trips to the freeway. Draft SEIR, pp. 56, 59. *Berkeley Keep Jets* specifically rejected such a rigid reliance on established

thresholds of significance where the EIR "contained no quantitative discussion" of the potential impact. 91 Cal.App.4th at 1381.

The draft SEIR's attempt to limit the analysis of traffic impacts to the 5:00 to 6:00 pm time period is not permitted by CEQA and results in the potential traffic impacts from the Modified Project being arbitrarily understated. As such, the draft SBIR must be revised and recirculated to correct this analysis by: (1) providing actual analysis of the Modified Project's impacts to freeway segment levels of service during the 6:00 to 7:00 pm time period; (2) assessing whether the Modified Project causes the substantial degradation of any of the freeway segments' levels of service; (3) identifying any significant impacts caused by the Modified Project at both the freeway segments and local intersections, including the four already acknowledged impacts at local intersections; and (4) mitigating those identified impacts to the extent feasible.

b. The draft SBIR fails to adequately describe the methodology used to analyze traffic impacts from the Modified Project.

An EIR must explain the analytical route taken or methodology used to reach the conclusions therein, and such methodology must be supported by substantial evidence. *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 404 (an EIR must set forth bases for findings; bare conclusions without explanation of its factual and analytical basis are insufficient). In several instances, the draft SBIR fails to adequately explain or support the methodology used for assessing the traffic impacts from the Modified Project.

First, the draft SEIR identifies a "simultaneous event scenario" which considers the traffic levels that would occur in the event of concurrent events at both the proposed Stadium and the HP Pavilion, e.g., an A's game and a Sharks' game were scheduled for the same weekday evening. But the simultaneous event scenario fails to take into account traffic that would result from downtown festivals or other cultural events, despite acknowledging that the 2005 Downtown Strategy specifically promotes an increased number of such events. It would not be difficult for the City to ascertain whether any past such events, e.g., the Cinco de Mayo or Grand Prix events, have occurred on days when both the Sharks and A's have had overlapping home games. Failure to do so is inadequate under CEQA.

The draft SBIR appears to rely on the 2005 Downtown Strategy 2000 Final EIR to conclude that, since the traffic impacts from the 2005 Downtown Strategy, including promotion of an increase in downtown social events, were considered, no further analysis is necessary. However, the 2005 Downtown Strategy 2000 Final EIR makes no reference to a proposed baseball stadium being located in the Diridon/Arena Area,

and certainly did not analyze the traffic from such a stadium in conjunction with the traffic from HP Pavilion and downtown festivals. Thus, the analysis in the 2005 Downtown Strategy 2000 Final EIR is irrelevant to the draft SEIR's formulation and analysis of the simultaneous event scenario. Further, to the extent the draft SEIR is relying on the 2005 Downtown Strategy 2000 Final EIR to demonstrate that an increase in downtown events is consistent with the City's vision for a vibrant downtown core, that analysis is more appropriately located in the Land Use section and does not excuse the City from undertaking a quantitative analysis of the traffic impacts associated with simultaneous events in the downtown area.

In addition, the draft SEIR's description of the methodology used for analyzing trip distribution from A's fans traveling from Alameda and Contra Costa Counties to watch games at a downtown San Jose Stadium is inadequate. The obligation to undertake such analysis comes from the 2007 EIR. In "Master Response Transportation, Circulation and Parking # 4 I-880," the City concluded it was not necessary to analyze the potential impacts on I-880 from A's fans travelling south from Alameda County to attend A's games at the Stadium. *See* First Amendment to Environmental Impact Report (Responses to Comments), p. 13. According to the 2007 EIR, however, "[i]f and when the City decides to pursue a ballpark at the subject site and a potential team is identified, the City will consider whether the assumptions made in this EIR remain valid or whether supplemental analysis is needed." As part of its analysis of the Modified Project, the City now acknowledges that the A's are in fact the team being targeted for occupancy of the proposed Stadium.

Despite acknowledging the need to analyze these traffic related impacts, the draft SEIR gives this issue short shrift. The draft SEIR concludes that "results of the supplemental traffic model forecast runs based upon A's fans base information resulted in a trip distribution on regional facilities (freeways) that was similar to that which was utilized in the original 2006 Sharks fan-derived traffic analysis ..." Draft SEIR, p. 48. On its face, it seems counterintuitive that the trip distribution would not differ substantially given the very different distribution for the fan bases for the A's and the Sharks. This result calls out for analysis and detailed explanation. However, no such explanation is provided and the "supplemental traffic model" is not described in either the draft SEIR or in the Traffic Impact Analysis ("TIA") attached as Appendix C to the draft SEIR. Both of these documents describe the model as "objective [and] reproducible" based on "a logically sound set of assumptions", but nowhere does the City actually describe the methodology in any detail, or provide the data or assumptions input into the methodology. This is inadequate for purposes of CEQA. *See Citizens of Goletta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568. The draft SEIR must be revised to provide the data and describe the methodology used to analyze trip distribution from A's fans from Alameda and Contra Costa Counties attending A's games in San Jose.

- c. The draft SEIR fails to adequately analyze impacts associated with relocating the proposed parking from south of Park Avenue to different locations.

As discussed above, the draft SEIR identified three potential locations for the relocated parking – the Montgomery/Autumn Structure, the HP Parking Structure and the No Parking Option. However, the analysis of the viability of these two structures is misleading because it fails to analyze the feasibility of each location as compared against the other. Specifically, while the SEIR acknowledges that the Montgomery/Autumn Structure is also being proposed to support a parking structure for the SVRTC project, it fails to analyze the potential conflict between these two uses, and in particular how this conflict bears on the feasibility of the Montgomery/Autumn Structure as a viable parking option.

This issue is particularly important given that both structures cannot use the same site. If, due to the SVRTC project, the HP Parking Structure option is chosen for the Modified Project, as discussed above, the HP Parking Structure has significant environmental issues related to archaeological resources, hazardous waste contamination, and undisclosed land use consistency concerns. Conversely, if, due to the Modified Project, the SVRTC project chooses another location for its parking structure, any impacts attributable to the new parking location are also cumulative impacts of the Modified Project together with the SVRTC project. The implications of this conflict and any resulting cumulative impacts should have been disclosed in the draft SEIR.

Further, concerning pedestrian safety, while the IS notes that the new parking structure sites are one or two blocks further away from the stadium than the parking structure in the 2007 EIR, it dismisses this as an insignificant change. IS, p. 59. However, as a result of this change, all the fans who drive to games and park in the structure must walk to the stadium. The draft SEIR does describe the up to 6,320 ballpark-bound pedestrians who would cross Santa Clara Street en route from the HP Parking Structure, but dismisses this concern because pedestrian crossings would be spread over a two-hour period as fans arrive before the start of game. Draft SEIR, p. 60. This discussion ignores any pedestrian-related impacts from people crossing the street from the Montgomery/Autumn Structure, and somewhat inexplicably ignores the fact that, at the end of the game, the same 6,320 pedestrians will cross the same streets to return to their cars over a much more concentrated period of time. The draft SEIR fails to adequately address the consequences of this concentrated stream of pedestrians or propose mitigation measures such as walk routes, signage and traffic control options. Moreover, the draft SEIR contains no discussion at all of the distribution of pedestrians, routes to the Stadium, and safety issues

associated with the No Parking Option. Failure to consider these issues in more depth is inadequate under CEQA.

7. Cumulative Impacts.

In response to several scoping comments, the draft SEIR has expanded its analysis and included the SVRTC project and the California High Speed Rail ("HSR") project as cumulative projects. However, while the draft SEIR undertakes a quantitative analysis for the SVRTC project, in particular related to traffic impacts, it concludes it can only undertake a qualitative analysis of the HSR project. The purported rationale for the limited qualitative analysis is that the HSR program EIR for the Northern California segment, which includes the connection to Diridon Station, was decertified in response to an adverse trial court ruling. The draft SEIR claims that quantitative information related to the HSR project's impacts in the Diridon Station area will not be available until the Northern California program EIR is recirculated.

However, this reasoning provides no support for the decision to not undertake a quantitative analysis for the HSR project's impacts in the Diridon Station area. The *Atherton v. California High Speed Rail Authority* decision, setting aside the final Northern California HSR program EIR, was based on two grounds: failure to revise and recirculate the HSR program EIR after Union Pacific Railroad ("UPRR") informed the HSR Authority that UPRR would not share the identified right-of-way for the preferred alignment, and for lack of substantial evidence supporting the claim that vibration impacts could be successfully mitigated to less than significant. Neither of these issues had any bearing on the validity of the quantitative traffic analysis contained in the HSR program EIR. In fact, the HSR program EIR includes a thorough and fully quantitative analysis of traffic levels and impacts caused by the HSR project in the Diridon Station area, a copy of which is attached hereto as Exhibit B. The draft SEIR could and should have relied on this quantitative information to perform its cumulative impacts analysis. This data is no different than data presented in a draft environmental document for a project, on which the City would be justified in relying.

Even assuming arguendo that performing a qualitative analysis of the HSR project's impacts on the Diridon Station area is adequate despite the existence of reliable and verifiable quantitative data, the SEIR does not actually undertake the qualitative analysis it claims. After the initial mention of the HSR project on pages 105-106, the draft SEIR is completely silent on the qualitative effects of the HSR project thereafter (Draft SEIR, pp. 111-116). The draft SEIR must undertake an analysis of the cumulative effects of the HSR project.

Further, the cumulative impacts section identifies the Ohlone Mixed-Use Development as a new cumulative project that was not previously identified in the 2007 EIR. Draft SEIR, p. 103, table V-1. However, the draft SEIR fails to describe this project in the same way it does the other newly identified cumulative projects (Draft SEIR, pp. 102-106), and does not make any effort to quantify the traffic trips or other cumulative impacts that might result from this project when analyzed in conjunction with the Modified Project, the SVRTC project, and the HSR project. The cumulative impacts analysis must be redone to take into account the Ohlone Mixed-Use Development project, and the draft SEIR must be revised and recirculated to permit the public to review and comment in this analysis.

Finally, in addition to the identified cumulative projects in the draft SEIR (p. 103), the City is currently processing applications for several other development projects in the vicinity of the Diridon Station area, all of which were filed after the 2007 EIR was certified. These projects include: a proposed 18,000-seat soccer stadium; a mixed-use project combining 600 residential units and 30,000 square feet of commercial space located on the site of the Japantown Corporation Yard; two other mixed-use projects (one with 825 residential units and 50,000 square feet of commercial space, the other with 218 units and 22,600 square feet) just south of the Project site near West San Carlos Street; and an urban public market on the east side of Highway 87. All of these projects are as close or closer to the Stadium site than the cumulative projects studied in the 2007 EIR, yet the draft EIR provides no explanation as to why these projects have not been considered. The SEIR must analyze the cumulative impacts from these projects, in combination with the Stadium, on all impact areas, including specifically parking demand, intersection and freeway on- and off-ramp levels of service, and freeway operations.

D. The Draft EIR Must Be Revised and Recirculated.

CEQA Guidelines § 15088.5 requires an EIR to be recirculated if "significant new information" is added to a draft EIR that shows:

- (1) a new significant environmental impact not previously identified would occur;
- (2) an identified impact would be substantially more severe;
- (3) a considerably different feasible alternative or mitigation measure that would avoid or substantially lessen impacts has been identified but the project proponent has declined to adopt it; or

March 29, 2010

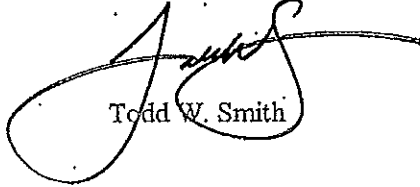
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(4) the draft BIR is so fundamentally and basically inadequate and conclusory in nature as to preclude meaningful comment.

Here, the City must recirculate the draft SEIR because the draft SEIR fails to analyze the impacts associated with land use plan amendments, fails to adequately identify impacts to intersection and freeway segment levels of service between 6:00 and 7:00 pm, fails to adequately disclose the full scope of the Modified Project, including the Modified Project's impacts in the areas of cultural resources and hazardous materials, and fails to adequately identify and analyze cumulative impacts from other projects planned for the project area. Recirculation is necessary in order for the decision makers and the public to be able to make an informed decision related to the proposed Baseball Stadium.

Thanks you for your consideration of these comments.

Very truly yours,



Todd W. Smith



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December 16, 2009

Akoni Daniels
City of San Jose, Planning Division
200 East Santa Clara Street, 3rd Floor
San Jose, CA 95113-1905

Re: Supplemental Environmental Impact Report for the Baseball Stadium
in the Diridon/Arena Area

Dear Mr. Daniels:

This firm represents Stand For San Jose, a coalition of entities and individuals including individual citizens of the City of San Jose and the San Jose Giants. Stand For San Jose's members are vitally concerned with the future of the City of San Jose ("the City"), and seek to ensure that issues critical to taxpayers, jobs, local businesses and neighborhoods are put first when the City evaluates proposed development projects that have the potential to significantly reshape the City's way of life. To this end, Stand For San Jose promotes a vigorous public planning and environmental review process to make certain that the City's citizens and decision makers have all of the information necessary to make informed decisions.

This letter provides Stand For San Jose's comments on the scope of the proposed Supplemental Environmental Impact Report ("SEIR") being prepared by the City for the "Baseball Stadium in the Diridon/Arena Area" ("Stadium" or "Project").¹ As stated in the Notice of Preparation ("NOP"), the City is proposing certain project changes related primarily to the size of the Stadium, as well as the location and size of parking facilities. The NOP states that the SEIR is being prepared for the limited purpose of analyzing and disclosing the environmental impacts of the proposed project revisions on traffic and global climate change, as well as updating the

¹ The City certified an EIR for the Project in February 2007 ("2007 EIR"). See Planning Commission Resolution 07-009.

alternatives analysis to compare the revised Project with the project reviewed in the 2007 EIR.

As explained below, the proposed scope of the SEIR is inadequate for purposes of complying with the California Environmental Quality Act ("CEQA") and the State CEQA Guidelines.² Pursuant to Guidelines § 15162(a)(2), substantial changes have occurred with respect to the circumstances under which the Project is being undertaken, requiring major revisions to the analysis in the 2007 EIR. In particular, the 2007 EIR asserted that the analysis of certain impacts was premature given that the City had yet to identify a specific major league baseball team to occupy the stadium. Based on recent statements by the owners of the Oakland Athletics ("the A's") regarding their desire to relocate the A's to San Jose, as well as statements by City officials encouraging such relocation, any notion that San Jose intends to use the Stadium to attract a team other than the A's must be abandoned. As such, the City must fulfill its commitment in the 2007 EIR to expand its environmental analysis once a specific team for the Stadium had been identified.

In addition, new information of substantial importance is now available which shows the Project could cause new, or substantially more severe, environmental effects. *See* Guidelines §§ 15162(a)(3)(A), (B). Specifically, since the certification of the 2007 EIR, the Santa Clara Valley Transit Authority ("VTA") and the California High Speed Rail Authority ("HSRA") have both formalized plans to extend service to include a significantly expanded intermodal transit station at Diridon Station. Thus, a significant expansion of Diridon Station from these two projects is reasonably foreseeable, and the SEIR must analyze cumulatively the impacts from such expansion, taken together with the impacts from the Stadium, on the surrounding area. Further, the City is currently processing applications for several significant new development projects, all of which post-date the 2007 EIR, in the general vicinity of the Diridon Station/Arena area. The cumulative impacts of these projects must also be analyzed together with the Stadium project.

² Pub. Res. Code § 21,000 et. seq. CEQA is implemented through the State CEQA Guidelines ("Guidelines") found at 14 Cal. Code Regs. § 15,000 et seq.

A. The City Should Update the Environmental Analysis for the Entire 2007 EIR So That the Public and the City's Decision Makers Have Current Accurate Information Regarding the Stadium's Potential Environmental Impacts.

Since certification of the 2007 EIR, the City has not taken any action on the Project in reliance on the 2007 EIR; nor has the City made the required CEQA findings of fact, or adopted a statement of overriding considerations or mitigation monitoring and reporting plan. Given the age of the 2007 EIR and the City's lack of project action (including not filing a Notice of Determination), reliance on the 2007 EIR would undermine the primary purpose of CEQA to disclose the potential environmental effects of a project to the public and decision makers. Intervening developments may have significantly altered the environmental baseline. Rather than rely on a two-year old EIR, the SEIR should update the environmental baseline for each impact area and, where necessary, update the environmental analysis as well.

B. The Identification of the A's as the Major League Baseball Team Likely to Occupy the Stadium Dictates that the City Supplement the 2007 EIR to Update the Potential Traffic Impacts on I-880.

In the 2007 EIR, the City indicated that, because it had yet to identify a specific major league baseball team to occupy the Stadium, analyzing certain impacts related to traffic on I-880 could be deferred to some future time. Specifically, in "Master Response Transportation, Circulation and Parking # 4 I-880," the City concluded it was not necessary to analyze the potential impacts on I-880 from A's fans travelling south from Alameda County to attend A's games at the Stadium. *See First Amendment to Environmental Impact Report (Responses to Comments)*, p. 13. According to the City, "[i]f and when the City decides to pursue a ballpark at the subject site and a potential team is identified, the City will consider whether the assumptions made in this EIR remain valid or whether supplemental analysis is needed." *Id.* Based on recent developments, it is clear that the City has decided to pursue a ballpark at the subject site and pursue a particular team – the A's.

In the December 2009 issue of San Francisco Magazine, an article titled "Now, pitching for San Jose ..." provides:

[A's owner Lew] Wolff is busy behind the scenes, planning the San Jose A's. *He has in mind the plot of land 500 strides directly south of HP Pavilion*, where the Sharks play. *Using no public money, on land the city has already bought and would lease or sell to [John] Fisher and Wolff, the A's would build a ballpark with 32,000 seats* that would be the most intimate in baseball. It would cost a relatively cheap \$400 million or so,

because of the recession; look modern, rather than retro; feature all manner of Silicon Valley high-tech bells and whistles; and be sponsored by Cisco – and it could be finished two or three years after the go-ahead. Wolff wouldn't be able to develop a mall or anything else around it – to his chagrin. *"The land we're getting is just for the ballpark"* (Emphasis added).

The proposed 32,000 seat stadium "500 strides directly south of HP Pavilion" on "land the City has already bought" is clearly the proposed Project.

Further, according to an October 31, 2009 article in the San Jose Mercury News, San Jose Mayor Chuck Reed and other city officials have *"been assembling plans* for a privately financed \$489 million ballpark." (Emphasis added). This news report is consistent with a April 2, 2009 Memorandum from San Jose Mayor Chuck Reed to the San Jose City Council, in which Mayor Reed stated that "[w]e must be ready should the team and Major League Baseball make a decision to allow the A's to pursue development of a stadium in San Jose."

Since it is now clear that officials from the City and the A's view the Stadium as the destination for the A's franchise if the A's elect to leave Oakland, the City must keep its commitment in the 2007 EIR to analyze the traffic impacts on I-880 from A's fans travelling south from Alameda and Contra Costa Counties, the A's long-time existing territory, to games in San Jose. This revised traffic analysis should not stop at impacts on the I-880, however. With a potentially disproportionate number of A's fans coming from the north, the City must reanalyze the assumptions in the 2007 SEIR regarding Stadium area parking and traffic impacts, including specifically freeway on- and off-ramp and intersection levels of service.

Also, while the 2007 EIR indicates that traffic distribution for A's games would most likely be similar to that for San Jose Sharks' games, this proposition seems questionable and will need to be tested and analyzed in the SEIR. Unlike the Sharks, which began as a new franchise with no existing fan base, the A's are an existing franchise with a long-established fan base. Thus, while the Sharks' fans are more likely to be distributed throughout the Bay Area, with an emphasis in the South Bay, the A's fan base is heavily based around the A's existing home in Oakland. Compared to the Sharks, a higher percentage of fans would be expected to come from Alameda and Contra Costa Counties. Further, the proposed Stadium would have nearly twice the seating capacity of HP Pavilion. The SEIR needs to analyze whether certain intersections that might operate at sufficient levels for Sharks' games would nonetheless reach a "critical mass" given the significantly greater number of people

who would be attending games at the Stadium, a larger percentage of which would be coming from the north.

C. The SEIR Must Analyze the Potential for Urban Decay Around the Oakland Coliseum that Could Result from the A's Relocation.

In *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184 ("*Bakersfield Citizens*"), the California Court of Appeal held that two EIRs for large commercial shopping centers were deficient for failing to analyze the centers' potential to indirectly cause urban decay in downtown Bakersfield. Citing Guidelines § 15064(e), the court found that when the economic or social effects of a project cause a physical change, this change must be regarded as a physical effect in the same manners as any other physical change from the project. "[W]hen there is evidence suggesting that the economic and social effects caused by [a project] ultimately could result in urban decay or deterioration, then the lead agency is obligated to assess this indirect impact. ... The lead agency cannot divest itself of its analytical and informational obligations by summarily dismissing the possibility of urban decay or deterioration as a 'social or economic effect' of the project." *Id.* at 1209.

Since new information now demonstrates that the Stadium is being developed as a proposed future home for the A's, the SEIR must analyze the potential indirect effects on the Oakland Coliseum area that will result from the A's relocation to San Jose. In other words, just as the shopping centers in *Bakersfield Citizens* had the potential to lead to urban decay in downtown Bakersfield as the result of the closure of downtown businesses, so to does the relocation of the A's to San Jose have the potential to lead to urban decay or deterioration in the area surrounding of the Oakland Coliseum due to the loss of one of the Coliseum's primary tenants and attractions.

The Oakland Coliseum is a center piece in the City of Oakland's broad ranging Coliseum Redevelopment Area Plan.³ A residential transit village and other commercial developments are planned in the immediate vicinity of the Coliseum. One of the City of Oakland's major selling points for this area is the fact that the Coliseum hosts several professional sports franchises, including a major league baseball team.⁴ The A's use the Coliseum more than any other tenant, and if the A's

³ For information regarding the Coliseum Redevelopment Area, see: www.business2oakland.com.

⁴ See Coliseum Marketing Brochure, available at www.business2oakland.com.

leave the Coliseum, that facility could sit empty and unused on at least 81 additional dates, with no viable replacement, a result that could potentially lead to neglect. In such a situation, the attractiveness of the area around the Coliseum as a redevelopment opportunity would significantly decrease. Under established CEQA authority, the potential for the loss of the A's to have an indirect adverse impact on the Coliseum Redevelopment Area must be analyzed in the SEIR.

D. The SEIR Must Analyze the Environmental Effects of Amending Various City Land Use Plans and Policies.

The 2007 EIR considered whether development of the Stadium in the Diridon/Arena area was consistent with the City's various land use plans and policies, including the City's General Plan, the Diridon/Arena Strategic Development Plan, the Midtown Specific Plan, and Burbank/Del Monte and Delmas Park Neighborhood Plans. It concluded the Project would be inconsistent with these plans or certain policies within them. According to the 2007 EIR, the plans would have to be amended prior to approval of the Project. *See* 2007 EIR, p. 50-59. However, the 2007 EIR deferred analysis of the environmental effects of amending these plans until *after* the potential ballot measure.

The City's proposal to defer environmental analysis of certain impacts until after the electorate's consideration of the potential ballot measure was legally dubious. As emphasized by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, environmental review must occur as early in the project planning process as possible in order to avoid an EIR becoming a "post hoc rationalization" for a project to which the public agency has already committed. The City's effort to defer environmental analysis of certain impacts of the Project until after the potential ballot measure clearly violates *Save Tara* because the very action of seeking approval of the Project from the electorate evidences an early commitment to the Project by the City. *See* Guidelines § 15352(a). The City has a duty to analyze and disclose all of the potential environmental effects of the Project *before* seeking approval from the electorate. *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 187. Otherwise, the electorate would be making an ill-informed decision and the necessary further environmental review would be consumed by

“bureaucratic and financial momentum,” rendering further analysis “practically moot.” *Save Tara*, 45 Cal.4th at 130, n. 9.⁵

Regardless of the viability of this position in 2007, the substantial changes in circumstances since the 2007 EIR was prepared dictates that the impacts from amending the various City plans be analyzed in the SEIR. As discussed above, since the certification of the 2007 EIR, the City is no longer speculating regarding which major league team it has targeted to occupy the Stadium. San Jose’s mayor has publicly stated that the City “must be ready” to accommodate the A’s, and the A’s have stated their intent to seriously consider relocation to San Jose. Thus, statements in the 2007 EIR that the environmental effects of wholesale amendments to the City’s various plans and policies will be analyzed only if “the voters authorize the use of public funds and the City Council *then* pursue development of a ballpark at the proposed site” are of no effect now since the City is actively pursuing a ballpark at the proposed site. In order to approve the proposed ballot measure for consideration by the electorate, the SEIR must be legally adequate; and, in order for the SEIR to be legally adequate, it must analyze the potentially significant environmental effects that could result from amending the City’s various plans and policies.

E. The SEIR Must Analyze the Impacts from New, Reasonably Foreseeable Projects in the Vicinity of the Stadium.

The 2007 EIR described the then-existing environmental baseline, identified several cumulative projects, and then analyzed the cumulative impacts from the Project accordingly. Since 2007, new information of substantial importance related to additional cumulative projects in the vicinity of the Diridon Station demonstrates that the Project may have new or substantially more severe impacts than previously disclosed.

In particular, planning for two significant regional transit projects has advanced and identified the Diridon Station as a proposed regional transit hub. In June 2007,

⁵ The City’s attempt to segment analysis of the environmental impacts from the various City plan amendments is also a clear violation of the CEQA doctrine of “piecemealing.” See Guidelines §§ 15063(a)(1), 15126.2(d); see also *Bozung v. Local Agency Formation Comm’n*, (1975) 13 Cal.3d 263, 284. As provided in *Bozung*, CEQA prohibits segmenting of projects so that “environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.” The City must correct this error in the SEIR.

following certification of the 2007 EIR, VTA certified a final supplemental environmental impact report for the Silicon Valley Rapid Transit Corridor ("SVRTC") project. Since that time, VTA, in coordination with the Federal Transit Administration ("FTA"), has published a draft environmental impact statement ("EIS"), and is in the process of preparing a final EIS for release in late 2009, for the SVRTC project.⁶ In July 2008, the HSRA certified the Bay Area to Central Valley Final Program EIR, and on January 9, 2009 published a Notice of Preparation for the "Project Environmental Impact Report/Environmental Impact Statement for a San Francisco to San Jose High Speed Train System."

These two projects both identify Diridon Station as an intermodal transit center with projected levels of service far greater than today, and involve the significant expansion of the Diridon Station footprint.⁷ Comparing the proposed Diridon Station footprint to the Stadium footprint reveals a potential conflict between the location of the Stadium's revised parking facilities and the Diridon Station parking facilities. Further, the SVRTC project involves extensive excavation related to construction of the subway box under the Diridon Station, which must be considered in conjunction with the Project's own significant excavation plans. Most importantly, both projects will add a significant number of new riders to the Diridon Station. The High Speed Rail project alone proposes to add 86 trains per day and more than 15,000 boardings at Diridon Station. While public transportation projects can benefit the environment, localized impacts on traffic (including specifically intersection levels of service, freeway on- and off-ramps and freeway segments), parking, noise and air quality due to carbon hotspots and greenhouse gas emissions often result from heavy use of particular stations. The impacts in the areas of traffic, parking, noise and air quality from the combination of the Stadium and these two significant transportation projects must be analyzed in the SEIR.

Finally, in addition to the SVRTC and High Speed Rail projects, the City is currently processing applications for several other development projects in the vicinity of the Diridon Station area, all of which were filed after the 2007 EIR was certified. These projects include: a proposed 18,000-seat soccer stadium; a mixed-use project combining 600 residential units and 30,000 square feet of commercial space located

⁶ The 2007 EIR makes a passing reference to the SVRTC project as a planned BART station adjacent to the stadium site. While the 2007 EIS elected not to analyze the proposed project, significant new information concerning this project has made it reasonably foreseeable.

⁷ See draft EIS, Figure 2-19.

on the site of the Japantown Corporation Yard; two other mixed-use projects (one with 825 residential units and 50,000 square feet of commercial space, the other with 218 units and 22,600 square feet) just south of the Project site near West San Carlos Street; and an urban public market on the east side of Highway 87. All of these projects are as close or closer to the Stadium than the cumulative projects studied in the 2007 EIR, and therefore the SEIR must analyze the cumulative impacts from these projects, in combination with the Stadium, on all impact areas, including specifically parking demand, intersection and freeway on- and off-ramp levels of service, and freeway operations.

For the foregoing reasons, the proposed scope of the SEIR is too narrow, and must be expanded as indicated above in order to satisfy the requirements of CEQA.

Sincerely,

SIGNATURE

Todd W. Smith
Senior Associate